

Poblete (Migration) [2024] AATA 129 (21 January 2024)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Mariza Gaddao Poblete

REPRESENTATIVE: Miss Charleen Ventura (MARN: 1462697)

CASE NUMBER: 1932398

HOME AFFAIRS REFERENCE(S): BCC2016/1578448

MEMBER: Christine Kannis

DATE: 21 January 2024

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) of Schedule 2 to the Regulations
- cl 820.221(2) of Schedule 2 to the Regulations
- reg 2.03A
-

Statement made on 21 January 2024 at 2:22pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship until sponsor’s death – financial, household and social aspects of relationship and nature of commitment – long relationship – sponsor’s health and applicant’s extensive care – deed of family arrangement between applicant and sponsor’s adult children – no close business or cultural ties – personal ties – church and friends – supporting statements – application made more than 28 days after last substantive visa held – long period as unlawful non-citizen – compelling reasons for not applying criterion – insufficient funds to make partner visa application – effect of sponsor’s death on consideration of compelling reasons – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65

Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A(3), Schedule 2, cls 820.211(2)(a), (d)
(ii), 820.221(2)(c), Schedule 3, criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

He v MIBP [2017] FCAFC 206

Kaur v MICMSMA [2020] FCCA 1081

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 26 April 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by the applicant.
3. The visa was refused because the delegate was not satisfied that the applicant's relationship with the sponsor met the definition of a de facto relationship under the Act and therefore she did not satisfy cl 820.211(2)(a). The delegate also decided that the applicant did not meet cl 820.211(2)(d)(ii).
4. The applicant appeared before the Tribunal by MS Teams video on 9 January 2024 to give evidence and present arguments.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. **Are the requirements for a spouse or de facto relationship met?**
8. The applicant is a Philippines national. The sponsor passed away on 9 August 2017 and was an Australian citizen. The applicant claimed to have been in a de facto relationship with the sponsor from 1 November 2008 until his death.
9. Clause 820.211(2)(a) requires that at the time the visa application was made, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
10. Relevant to the present case, the time of decision criteria in cl 820.221(2) says:
 11. **(2)** An applicant meets the requirements of this subclause if the applicant:
 12. (a) would continue to meet the requirements of subclause 820.211(2), (5) or (6) except that the sponsoring partner has died; and
 13. (b) satisfies the Minister that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and
 14. (c) has developed close business, cultural or personal ties in Australia.
 - 15.
 - 16.

17.

18. Section 5CB of the Act provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2). In forming an opinion as to whether parties are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
19. The first issue in the present case is whether the applicant meets the requirements of cl 820.211(2)(a) at the time of application and cl 820.221(2) at the time of decision.
20. The second issue is whether the applicant meets the Schedule 3 criteria as required by cl 820.211(2)(d)(ii) and if not, whether there are compelling reasons for not applying the criteria.
21. The Tribunal considered the evidence against the reg 1.09A(3) factors.

22. *Financial aspects*

23. The Tribunal considered the evidence in relation to the financial aspects including joint ownership of assets, joint liabilities, any legal obligations owed to the other party, the extent of pooling of financial resources and any sharing of day-to-day household expenses.
24. At the time of application the applicant provided a written statement dated 22 April 2016 in which she said she and the sponsor had been living together for 8 years and that the sponsor supported her financially because she did not have a work permit.
25. In a written submission from the applicant's migration agent dated 1 October 2018, the following information was provided:
- The parties shared financial responsibilities and daily expenses. The sponsor was unemployed due to his medical condition and received pensions from Centrelink and Croatia. The sponsor owned the unit in which the parties lived and his pension was enough to pay for their daily living expenses. The applicant worked part-time and would sometimes pay for groceries.
 - The parties tried to open a joint bank account however were unable to do so because the applicant did not have a valid visa and couldn't provide any Australian identification.
 - The parties did not have any joint assets and did not have joint liabilities.
26. Based on the evidence the Tribunal finds at the time of application, the applicant and the sponsor did not jointly own any real estate or other major assets and did not have any joint liabilities.
27. Based on the evidence the Tribunal finds that the sponsor financially supported the applicant during their relationship and up until his death and this is an indicator of a de facto relationship. The Tribunal finds there was no pooling of financial resources and that there

was some limited sharing of day-to-day financial responsibilities insofar as the applicant sometimes paid for groceries.

Nature of the household

28. The Tribunal considered the evidence in relation to the nature of the household including any joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.
29. In her written statement dated 22 April 2016, the applicant said she did the laundry, cleaning, cooking and other household work and that she and the sponsor did the grocery shopping together. She said they lived in a 2 bedroom unit and they slept together in the master bedroom.
30. A statutory declaration dated 15 February 2016 made by the applicant's neighbour, Yolanda Calma, was provided in which she stated she often saw the applicant and sponsor in the building.
31. Correspondence addressed to the parties individually at the same address in 2008 and 2009 was provided. Correspondence addressed to the parties in joint names at the same address in 2015 was provided.
32. The Tribunal finds that the parties resided at the same residential addresses during their relationship and up until the sponsor's death.

33. *Social aspects of the relationship*

34. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether the parties represent themselves to other people as being in a de facto relationship, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the persons plan and undertake joint social activities.
35. In her written statement dated 22 April 2016, the applicant said she and the sponsor went out as a couple including to the RSL club on weekends. She said they attended mass at the Croatian Community Church and social gatherings together. She said they spent time with the sponsor's friends in the Croatian community and her Filipino community and they introduced each other to their respective communities as a couple. The applicant stated that she and the sponsor spent Christmas, New Year and birthdays with friends.
36. At the time of application, 2 statutory declarations by a neighbour (Yolanda Calma) who had known the parties for 4 years and by a friend (Lilian Pratt) who had known them for 5 years were provided. The declarants referred to regularly spending time with the parties and provided reasons for their belief that the relationship was genuine and continuing.
37. The evidence before the Tribunal included 2 statutory declarations made by friends of the parties made in September 2018. In a statutory declaration, James Spradbrow provided detailed and cogent reasons for his belief that the relationship was genuine and continuing. Mr Spradbrow stated that he had known the parties for 8 years. In a statutory declaration, Crisanta Bala, provided detailed and cogent reasons for her belief that the relationship was genuine and continuing. Ms Bala stated that she had known the parties for 8 years.
38. Prior to the hearing, the applicant provided 2 statutory declarations dated 29 December 2023. In a statutory declaration, Ivitsa Kocka provided detailed and cogent reasons for his belief that the relationship was genuine and continuing. In a statutory declaration, the parties'

former neighbour and friend, Radwan El Degham, provided detailed and cogent reasons for his belief that the relationship was genuine and continuing.

39. The evidence before the Tribunal included a Deed of Family Arrangement between the applicant and the sponsor's adult children. The document acknowledges that the applicant and the sponsor lived together as de facto partners for 8 years prior to his death and that the sponsor's children agreed to vary his Will to divide the estate into three equal shares.
40. Photos of the parties with other people at social events in 2009, 2010, 2011, 2012 and 2015 were provided.
41. Based on the evidence, the Tribunal finds that during their relationship and up until the sponsor's death, the parties represented themselves to other people as being in a de facto relationship and that friends accepted that they were a couple. The Tribunal also finds that the parties undertook joint social activities during their relationship and up until the sponsor's death.

The nature of the parties' commitment

42. The Tribunal considered the nature of the persons' commitment to each other including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
43. In her written statement dated 22 April 2016, the applicant said she accompanied the sponsor to his medical appointments and ensured that he was compliant with his medication regime including his daily insulin injection. She said the sponsor told her he loves her and will not abandon her until he dies. She said they had been living together since 2008 and their relationship is genuine and continuing and they are committed to each other. The applicant stated that her future is with the sponsor and their relationship is stable, continuing and she cannot think of any person to be with for the rest of her life.
44. A handwritten statement made by the sponsor was provided in which he requested that the Department grant the applicant permanent residency and described the care she provided to him and their love for each other.
45. In a written submission from the applicant's migration agent dated 1 October 2018, the following information was provided:
 - The parties had been in an exclusive and loving relationship since 1 November 2008 until the death of the sponsor on 9 August 2017.
 - The parties relied on each other for emotional and mental support and the applicant was committed to taking care of the sponsor until his death. She did not leave his side and helped the nurses take care of him until the last moment of his life.
46. Regarding whether the requirements of s 5CB(2) were met at the time of application, the Tribunal decided:
 - the parties were not married;
 - the parties lived together;
 - they were not related by family;

- they had a mutual commitment to a shared life together to the exclusion of others; and
- the relationship was genuine and continuing.

47. Therefore the applicant meets the time of application criteria in cl 820.211(2)(a).
48. As noted, the relevant time of decision criteria are found in cl 820.221(2). The Tribunal decided that the evidence demonstrated that the applicant and the sponsor were in a genuine and continuing de facto relationship at the time of the sponsor's death and that the applicant would continue to meet the requirements of subclause 820.211(2) except that the sponsoring partner died and the applicant would have continued to be the de facto partner of the sponsoring partner if the sponsoring partner had not died. Therefore, cl 820.221(2)(a) and (b) are met.
49. Clause 820.221(2)(c) requires that the applicant has developed close business, cultural or personal ties in Australia. The concept of "close ties" in this context has not been specifically considered in case law. Furthermore, the Tribunal has not been able to locate any Explanatory Statement in respect of it so it remains purely a question of fact for it to determine. However, Department policy does suggest that, in assessing whether the necessary ties have developed, regard should be had to the extent to which the ties have formed and/or strengthened over time.
50. There is nothing before the Tribunal to indicate that the applicant has developed close business or cultural ties in Australia and the Tribunal so finds.
51. The Tribunal considered whether the applicant has developed close personal ties in Australia. The evidence before the Tribunal included written statements from 4 of the applicant's friends in which they described their longstanding friendships with her including one friend who said she is like a sister to her. A letter dated 22 September 2019 from Pastor Israel Marquez of the Immanuel Missionary Baptist Church and photos of the applicant with others at church events were provided to demonstrate the applicant's personal ties with the church.
52. Taking into account these written statements, the letter and the photos, the Tribunal finds that the applicant has developed close personal ties in Australia at the time of this decision. Therefore cl.820.221(2)(c) is met.

Are the additional criteria for a de facto relationship met?

53. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
54. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
55. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they

must meet the 12 month requirement. The Tribunal accepts that the parties had been in a de facto relationship from 2008 until the sponsor's death in 2017. The visa application was lodged on 26 April 2016. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.

56. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

57. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d)(ii).
58. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

59. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in criterion 3001(2), as set out in the attachment to this decision. Departmental records show that the applicant last held a substantive visa on 1 October 2007, being the relevant day. The Partner visa application was lodged on 26 April 2016. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

60. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
61. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32. The decision in *Waensila* means that a decision maker is not confined to having regard to circumstances that amount to compelling reasons only at the time of application and that the applicant's circumstances as a whole are to be taken into account.
62. In a statutory declaration dated 28 September 2018, the applicant provided the following relevant information in relation to compelling reasons:
- She loved the sponsor and is grateful that they had 8 amazing years together.
 - She first met the sponsor in person in July 2008. He mentioned an infection and that the doctor was suggesting amputating his leg.

- She visited him in hospital. He was in the hospital for a few weeks. Only a few of his friends visited him. His children did not visit. She stayed with him the whole time and when he was discharged she cared for him at his house as he adjusting to his amputated leg and couldn't do things by himself.
- After 4 months he professed his love to her and asked her to move in with him and she officially moved in on 1 November 2008.
- Living together made their relationship stronger. The sponsor opened up about his family and shared his pain because his children abandoned him.
- She accompanied him to court appearances and solicitor appointments in relation to the sponsor's divorce and to hospital and doctor appointments.
- The sponsor had several health issues aside from his diabetes and amputation. He also had poor vision and lost his hearing in both ears. He was dependent on her. As he grew older, the sponsor's health continued to deteriorate. A few months before his death he refused to go out and preferred to stay home. He missed his children and he would drink to cope with his sadness. She tried hard to reduce his alcohol intake but he was so stubborn and his drinking affected his health. In May 2017, he feet started to swell up. He refused to go to the GP until his stomach started swelling up too. He couldn't move because of his stomach and he became bedridden and would stay in bed the whole day drinking beer. By this time, she had ceased her part-time job so she could stay home and look after the sponsor because he needed full time care. He finally went to the hospital because he fell out of the bed and was unconscious. When he regained consciousness, he yelled at the paramedics because he did not want to go to the hospital. The paramedics called firemen to help carry him to the ambulance. When they arrived at the hospital, the doctors said poison had spread to the sponsor's body from the water in his stomach. They emptied the water in his stomach and he slowly recovered. The doctors wanted him to stay in hospital but he discharged himself against doctor's orders.
- After 2 weeks, the sponsor was back in the hospital because his stomach was swollen. His stomach was emptied again but the poison had spread to his brain and he went into a coma. She did not leave his side until the day he died and she kept talking to him so he knew that he was not alone. He died holding her hands. She lost her partner and best friend.

63. In a written submission from the applicant's migration agent dated 1 October 2018, the following was provided in support of waiver of Schedule 3 criteria:

- The sponsor's dependence on the applicant continued throughout their relationship. His medical condition worsened after the lodgement of the visa application. He was bedridden a few months before his death and the applicant took care of him.
- The sponsor would have suffered significant psychological and financial hardship if the applicant lodged the visa application offshore. His medical condition would not allow him to travel to the Philippines while her visa application was being processed.

64. The applicant told the Tribunal that the sponsor was unable to survive without him. She said he was very weak and in 2015 his health deteriorated to the extent that he found it difficult to stand without assistance. She said he could not manage any household chores or manage his medications including his insulin.

65. In response to the Tribunal asking whether the sponsor could have travelled with her to the Philippines while she awaited the outcome of an offshore Partner visa application, the applicant said the sponsor was willing to go with her but the cost of his medication in the Philippines would have caused financial hardship. She said he was reliant on his pension and the medication would have been expensive.
66. In response to the Tribunal asking the reason she remained unlawfully in Australia from 1 October 2007 to 26 April 2016, the applicant said she was initially unlawful because she stayed in Australia to earn money because she owed money to people in the Philippines. The applicant said the reason she remained unlawful for such an extended period was because she and the sponsor did not have the \$5,000 required to lodge the Partner visa application and the money for a lawyer. She said they planned to lodge the application however they were unable to save enough and eventually she asked her sisters for a small amount. She said the sponsor saved \$4,200 from his pension.
67. The applicant told the Tribunal that she has been in Australia for 17 years and it would be very difficult for her to start a new life in the Philippines, especially at her age. At this point in the hearing the applicant became visibly distressed.
68. The Tribunal accepts that the sponsor suffered serious medical conditions during the relationship and accepts that the applicant provided him with extensive care, particularly from 2015 until his death. The Tribunal accepts that the sponsor would have suffered financial hardship had he travelled to the Philippines with the applicant to lodge an offshore Partner visa application. The Tribunal accepts that the sponsor would have suffered significant personal hardship if the applicant travelled to the Philippines to lodge the Partner visa application insofar as he would no longer have the extensive daily care she provided.
69. The Tribunal considered whether the fact that the duration of the parties' relationship constitutes a compelling circumstance. The Tribunal is mindful that the Explanatory Statement to the 1996 Schedule 3 amendments, in providing examples of compelling reasons, states: where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer. In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).
70. The relevant Departmental policy requires consideration in this case because of the applicant's migration history. The policy stresses that; ...the provisions are not intended to give, or be perceived to give an unfair advantage to persons who:
- Fail to comply with their visa conditions or
 - Deliberately manipulate their circumstances to give rise to compelling reasons or
 - Can leave Australia for a partner visa outside Australia.
71. The applicant remained unlawfully in Australia from 1 October 2007 until 26 April 2016 and was therefore an unlawful non-citizen for more than 8 years before lodging the Partner visa application. The applicant told the Tribunal that the reason she remained unlawful from 2008 until 2016 was because she did not have sufficient funds to lodge the Partner visa application. The Tribunal accepts this and does not consider the timing of the application was an attempt to manipulate the migratory outcome to establish a likely compelling reason to meet the visa requirements. Notwithstanding, the applicant did not seek to legalise her visa status and the Tribunal considers the period of unlawfulness was not insignificant. The Tribunal places some weight on the applicant maintaining an ongoing presence in Australia without having a lawful right to do so.

72.

73. *Overall assessment*

74. The Tribunal has considered the factors relevant to the case including those raised by the applicant.
75. The Tribunal has balanced the applicant's migration history with her and the sponsor's relationship and her current circumstances. The Tribunal is mindful that the applicant has found herself in this position due to her breach of Australia's immigration law however considers that it cannot make a decision predominantly based on the applicant's migration history. In assessing whether there are compelling reasons for waiving the Schedule 3 criteria, the Tribunal is required to assess the evidence as a whole.
76. The death of the sponsor means that the applicant cannot lodge an offshore Partner visa application. There are very few authorities on the effect of a sponsor's death in the context of compelling reasons for not applying the Schedule 3 criteria. However, the Federal Circuit Court did consider this question in *Kaur v MICMSMA* [2020] FCCA 1081. In that case, the judge characterised the death of the sponsor as being a matter "that must bear heavily" on the question of whether or not there were compelling reasons given that the applicant could not apply for another spouse visa once the visa application was dismissed. While the judge elsewhere in that case opined that this "weighty" circumstance does not necessarily overshadow other circumstances, in the eyes of the Tribunal such other circumstances would by their very essence need to be weightier. The Tribunal cannot identify such circumstances here, and as such it believes that the death of the sponsor and the subsequent inability for the applicant to either satisfy the time of decision criteria for the present visa or apply for an offshore Partner visa in respect of the same relationship constitutes a compelling reason for not applying the Schedule 3 criteria.
77. There is no need to consider the other claimed reasons however for completeness, having considered the evidence before it, the Tribunal is satisfied that there are additional compelling reasons for not applying the Schedule 3 criteria in this case. In making this determination the Tribunal gives significant weight to the sponsor's medical conditions, the extensive care provided by the applicant and the likely personal difficulties that may have arisen for the sponsor during any separation while waiting for a Partner visa application to be processed offshore and the length of the parties' relationship.
78. Accordingly, the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria and therefore the applicant meets cl 820.211(2)(d)(ii).

Requirements of cl.802.211(2) and cl.820.221(2)

79. Clause 820.211(2) requires at the time of application, the applicant meets subclauses (a), (c) and (d).
80. For the reasons set out above, the Tribunal is satisfied that the applicant was the de facto partner of an Australian citizen at the time of application, and therefore the applicant meets the requirements of cl.820.211(2)(a). The Tribunal is also satisfied that the applicant was sponsored by her sponsoring partner and that he had turned 18 at the time of application and therefore the applicant meets the requirements of cl.820.211(2)(c).
81. For the above reasons the Tribunal is satisfied that the applicant meets the requirements of cl.820.211(2)(d)(ii).

82. For the above reasons the Tribunal finds that the applicant meets the requirements of cl.820.211(2)(a), (c) and (d), and therefore meets the requirements of cl.820.211(2).
83. Clause 820.221(2) requires at the time of decision, the applicant meets subclauses (a), (b) and (c).
84. For the above reasons the Tribunal is satisfied that the applicant would continue to meet the requirements of cl.820.211(2) except that the sponsoring partner has died, and therefore meets the requirements of cl.820.221(2)(a). The Tribunal is also satisfied that the applicant would have continued to be the spouse of the sponsoring partner if the sponsoring partner had not died, and therefore meets the requirements of cl.820.221(2)(b).
85. The Tribunal is satisfied that the applicant has developed close personal ties in Australia, because she has resided in Australia for 17 years and she has developed close friendships in Australia. Therefore the Tribunal is satisfied the applicant meets the requirements of cl.820.221(2)(c).
86. For the above reasons, the Tribunal is satisfied that the applicant meets the requirements of cl.820.221(2)(a), (b) and (c), and therefore meets the requirements of cl.820.221(2) at the time of decision.
87. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

88. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2) of Schedule 2 to the Regulations
 - cl 820.221(2) of Schedule 2 to the Regulations
 - reg 2.03A
 -

Christine Kannis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.